

UNITED STATES MISSION TO THE UNITED NATIONS
NEW YORK

February 1, 2010

The United States Mission to the United Nations presents its compliments to the United Nations and has the honor to refer to the Secretariat's note LA/COD/47 of 15 September 2009, requesting comments and observations on the draft articles on the effects of armed conflict on treaties, adopted, on first reading, by the International Law Commission at its sixtieth session. The United States Mission presents the enclosed comments and observations of the Government of the United States of America and requests the Secretariat's assistance in transmitting this response to the International Law Commission.

The United States Mission avails itself of this opportunity to renew to the United Nations the assurances of its highest consideration.

Enclosure

REM

DIPLOMATIC NOTE

COMMENTS AND OBSERVATIONS OF THE UNITED STATES OF AMERICA ON THE
DRAFT ARTICLES AND COMMENTARIES ON
THE EFFECTS OF ARMED CONFLICTS ON TREATIES, AS ADOPTED, ON FIRST
READING, BY THE INTERNATIONAL LAW COMMISSION AT ITS SIXTIETH SESSION

The United States recognizes and applauds the significant work of the Commission and the former Special Rapporteur in completing a first reading of the draft articles on this important topic. The United States has consistently supported the general approach taken by the draft articles, which preserves the reasonable continuity of treaty obligations during armed conflict and identifies several factors relevant to determining whether a treaty should remain in effect in the event of an armed conflict. In providing our most significant points here, we do not foreclose the possibility of raising additional issues at a later time.

Regarding the Commission's recent work, we agree that the determination as to whether a treaty is susceptible to termination or suspension in the event of an armed conflict is to be made based on the circumstances surrounding the particular treaty and armed conflict, and on Articles 31 and 32 of the Vienna Convention (*i.e.*, the general rules of treaty interpretation based on the relevant terms' ordinary meaning in their context and in light of their object and purpose). In addition, while we still have some concerns with the effort in the annex to categorize by subject matter treaties that generally would continue in operation during armed conflict, we support the decision to characterize this list of categories as indicative and non-exhaustive. In particular, we support the statement in the commentary to Article 5 that it may well be that only the subject matter of particular provisions of a treaty in one of these categories may carry the necessary implication of their continuance. For example, treaties of friendship, commerce and navigation often contain provisions regarding bilateral commerce that might need to be

suspended during armed conflict between the parties. It would be useful to make these points in the final commentary.

Notwithstanding our support for the general approach taken by the Commission on this topic, the United States continues to believe that the draft articles require further work and consideration. In particular, we reiterate our serious doubts regarding the appropriateness of including a definition of “armed conflict” in draft Article 2. It is worth noting that even treaties directly relating to armed conflict, such as the Geneva Conventions, do not define this term. There is a wide variety of views on this question and such a definition would be more properly addressed in a treaty negotiated between states. If a definition of armed conflict is thought necessary, the one contained in Article 2 seems doubtful, in that it is quite different from any contemporary treatment in modern treaties or judicial decisions. Regarding the commentary on this provision, the definition of armed conflict included here appears to conflate military occupation with armed conflict, when the two terms have distinct meanings in the law of armed conflict and thus should be referred to separately in the context of the draft articles, if they are referred to at all.

A better approach in draft Article 2 would be to make clear that armed conflict refers to the set of conflicts covered by common Articles 2 and 3 of the 1949 Geneva Conventions (*i.e.*, international and non-international armed conflicts). This approach would reach virtually every situation that the Commission’s work intends to reach. Any effort to craft a definition in this context (even with the disclaimer that it is intended to apply only in this context) risks complicating the matter.

In addition, we have concerns that Article 13 might be misread to suggest that a state acting in self-defense has a general right to suspend treaty provisions that may affect its exercise

of self-defense. At a minimum, the commentary should clarify that, to the extent such a right exists, it would be a limited right that does not affect treaty provisions that are designed to apply in armed conflict, in particular the provisions of treaties on international humanitarian law and the regulation of armed conflict such as the 1949 Geneva Conventions.

Third, we have concerns with aspects of draft Article 15, which prohibits an “aggressor State” from benefiting from the possibility of termination or suspension of a treaty as a consequence of the armed conflict it has provoked. This article is problematic to the extent it incorporates the definition of aggression set forth in U.N. General Assembly Resolution 3314 (XXIX). In resolution 3314, the General Assembly recommended that the Security Council, as appropriate, take account of this definition as guidance in determining, in accordance with the UN Charter, the existence of an act of aggression. By directly incorporating that definition into draft Article 15 and specifying the legal consequences that flow from actions falling within the definition, the United States believes that the provision fails to properly recognize the process described in the UN Charter for making an authoritative determination of aggression, and arguably leaves to the belligerent state the ability to decide whether it has committed aggression. In addition, this provision may be unnecessarily limited in scope as it does not address circumstances where a state has illicitly used force in a way that does not amount to aggression. It is not clear to us why this rule only should be limited as such and we urge the Commission to revisit the issue of scope.

As a result, we recommend that the reference to resolution 3314 be deleted and that, instead, the first clause of the article, at a minimum, provide as follows: “A State committing an act of aggression as determined in accordance with the Charter of the United Nations shall not terminate....” We believe that this alternative appropriately recognizes that there is a process

under the Charter to determine when aggression has occurred, from which other legal consequences may follow.

Finally, on a more minor note, draft Article 8.2 regarding the effective date of notification of termination, withdrawal, or suspension should be made subject to the proviso: “unless the notice states otherwise” in order to preserve the possibility that a State may wish to provide notice in advance of the effective date of termination.